IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Second Appeal No.1165 of 2005
with
Civil Application No.1642 of 2005

Verpaksha Ramayya Swami and others ..Appellants

vs.

The State of Maharashtra & Ors. ..Respondents

Shri S.M.Oak for appellants.
A.G.P. for respondent no.1
Shri Nitin Jamdar for respondent nos. 2 to 6

CORAM: S.C.DHARMADHIKARI J.
11th July, 2007

P.C.

1. Heard the learned Counsel appearing for the parties, namely, original plaintiffs/appellants, learned A.G.P. for respondent no.1 and Shri Jamdar appearing for the original defendants/respondents.

2. Admit.

3. The substantial questions of law as framed are:

(a) Whether the learned Additional District Judge, Pandharpur ought to have appreciated that the Civil Appeal No.159 of 1999 was on the board on 8th February, 2005 and that the stage of the said Appeal was for the Respondents to pay cost towards the paper book and that the respondents did not pay

the cost towards the Paper book?

(b) Whether the learned Additional District Judge, Pandharpur was right in proceeding with the hearing of the Civil Appeal No.159 of 1999 when the stage of the said Civil Appeal No.159 of 1999 was of Paper Book and as such the said Civil Appeal no.159 of 1999 was not on the board for hearing?

4. By consent of respective Advocates, the appeal is heard finally at this stage itself.

5. The substantial questions of law that are raised before me in the present second appeal and framed as above arise for consideration in the context of disposal of the appeal which was filed challenging the judgment and decree of the Trial Court. The appeal was preferred by the original defendant nos. 2,4, 5 and 6 challenging the judgment and decree of the Civil Judge, Sr.Dn., Pandharpur in Special Civil Suit No.104 of 1992.

6. Upon hearing the appellants' Advocate Shri Oak, notice was issued by this Court to the respondents indicating therein that the appeal would be heard finally. Since the contesting respondents are before me with their consent the appeal is being heard finally.

7. The grievance projected by Shri Oak is that this appeal on the relevant date was not posted for hearing and final disposal but for payment of process fees and charges with regard to preparation of the paper book. It is in these circumstances that the appellants' Advocate did not remain present when the same was heard. Learned Advocate submits that the appellants could not have expected to be ready to argue the matter on merits in any event in as much as it was placed for compliance with the requirements stipulated by the Registry of the lower Appellate Court. Roznama is relied upon to contend that even in the final judgment of the lower Appellate Court, appearance of the appellant and A.G.P. for the State only are recorded whereas none appeared for the original plaintiffs and defendant nos. 1 and 3. My attention is invited to para 6 of the impugned order wherein it was observed that the other respondents and their Advocate remained absent at the time of hearing of the appeal.

8. This Court had also called for the record and proceedings and the roznama to ascertain as to whether the grievance projected by the appellants has any substance or not.

9. Upon perusal of the record, both sides do not dispute that the Civil Appeal No.159 of 1999 which has been disposed of by the impugned order reversing the decree of

the Trial Court was not listed on the relevant date on board for hearing and final disposal. It is in these circumstances that the matter has been decided exparte and in absence of the present appellants.

10. None disputes the fact that Civil Appeal No.159 of 1999 is a regular first appeal preferred under sec.96 of the Code of Civil Procedure to challenge the judgment and decree of the Trial Court. This appeal may be preferred by a party who has lost in the Trial Court but it is the bounden duty of the lower Appellate Court to hear both sides and upon complete hearing so also perusing the entire record decide the same in accordance with law. The duties of the lower Appellate Court need not be set out in this behalf. Suffice it to state that the decree of the Trial Court is open for being challenged on facts as well as on law. In such circumstances, even the successful party before the Trial Court has every right to point out to the lower Appellate Court that the decree need not be disturbed and findings of the Trial Court need not be reversed. While supporting the judgment, it is always open for it to make appropriate submissions. That opportunity ought not be denied save and except in case where despite putting to notice repeatedly the respondents to the civil appeal remained absent. It is in these circumstances that I find considerable merit in the submission of Shri Oak and this Csourt’s jurisdiction

under section 100 of the Code of Civil Procedure has rightly been invoked.

11. In the result, second appeal is allowed. The judgment and decree of the lower Appellate Court dated 16th February, 2005 in Civil Appeal No.159 of 1999 is set aside. Civil Appeal No.159 of 1999 stands restored to file of the lower Appellate Court for being disposed of afresh on merits and in accordance with law as expeditiously as possible and in any event within a period of six months from today. Parties to appear before the lower Appellate Court on 30th July, 2007.

12. Needless to state that prior to this date both sides to communicate this order to the lower Appellate Court and Registry of the lower Appellate Court shall complete all pre hearing formalities and make the said appeal ready for hearing and final disposal on the date of appearance of the parties and thereafter the lower Appellate Court shall endeavour and dispose of the same within the time stipulated above.

13. Needless to state that this Court has not gone into the rival contentions on merits of the matter and all questions of law and facts are expressly kept open. Second appeal is allowed only on the limited ground that the lower Appellate Court when it has not listed the

matter for hearing and final disposal after due notice to the parties should not have proceeded exparte and decided the appeal in absence of either parties. In such circumstances there shall be no order as to costs.

14. In view of disposal of the second appeal civil application does not survive and hence it is rejected as such.

(S.C.DHARMADHIKARI J.)